is before Your Honor. There is the contempt order in which a motion is pending to set aside that contempt order.

I think we all recognize that when an order of con-
13 tempt is issued that there is a certain stigma in the public mind against the contemners who are subject to that order, and I believe that these are fine, law-abiding citizens, I do not believe they were in contempt of any order because no order is outstanding. There was merely a remand from the Supreme Court for further proceedings in conformity with the decision of the court. So, hence, it is our position, as we have stated in our memorandum to you, that there was nothing for these executives at this point to be in contempt of. And if I may very briefly, I would like to go back of that, because implicit in any conception of contempt is the unfortunate inference that there is some course of wrongful or unlawful conduct.

Now, this consolidation was effectuated, as Your Honor knows, in March of 1961. The state of the law with respect to bank consolidations and mergers was then, as it is now, in a state of some confusion. The bank merger act was passed in 1960, where there was a jurisdictional dispute between the committees of Congress as to whether the judiciary or the banking and currency committee should have jurisdiction of the authorizing legislation guiding bank mergers. And as frequently happens in the
14 legislative processes, as Your Honor well knows, there was a compromise and the standard, as set forth in the bank merger act of 1960, stated that competition, the competitive effect, was one and only one of the criteria that should be considered. So, hence, these two instittuions embarked upon this program, feeling that they were engaged in an entirely proper and lawful course of conduct. The Department felt otherwise and the result is we are here today to try to work out a plan. But I want to emphasize as forcefully as I can, if Your Honor please, that there has been no course of conduct that was not sanctioned by a cold interpretation of the statute and the

officers and the executives of this bank, of the two institutions which are now the one, had reason to believe that they were not in violation of Section 1 of the Sherman Act, that this was not a conspiracy for the restraint of trade. Certainly, as this record shows and was recognized in the argument in the Supreme Court, there was no allegation of any Section 2 violation. There is nothing here that there was any predatory course of conduct that is so frequently found in many antitrust cases. The government didn't allege it and we did not—it was conceded and acknowledged.

Now, very briefly I would like to just emphasize that point. Since the decision has come down in this case from the Supreme Court, the Manufacturers Hanover, in the Southern District of New York, Senator Robertson, Chairman of the Banking and Currency Committee, repeated what his view of the applicable law was and that is that the bank mergers would be regulated by the federal banking agencies and not the Department of Justice under general antitrust laws. Well, the Supreme Court did not agree with Senator Robertson as chairman of the legislative committee, with interpretation and I cite that only, if Your Honor please, as the fact that there is no circumstances here in our view that would support the suggestion of any course of conduct that was in any way contemnatious.

Now, next I would like to go very briefly into the background of what has been done in this matter which also relates to Your Honor's earlier order. When the Supreme Court decision came down, as our pleadings here show, there was an immediate conference at New York with counsel for the bank and the parties and the Department of Justice. There Mr. Orrick took the position that divestiture was the form of relief commanded by the decision of the court, even though, as Your Honor knows, on the same day, the El Paso case came down in which divestiture was directed by the court in

the El Paso, divestiture without delay. Now, this was on the same day and I may say, Your Honor, that that case is still pending before Judge Ritter, in the Utah District, to work out the details and form of that complicated merger and presumably he will hand down findings and an opinion in due course.

Now, we were brought into the case—

The Court: What is your inference from the El Paso case, that the court inferentially suggested the same thing to this court in this case or deliberately ignored—

Mr. Porter: No, Your Honor.

The Court: —making such a recommendation?

Mr. Porter: No, Your Honor. I will say that when I first read this case, the Lexington case, and contrasted what the court did in El Paso, it was my view that perhaps some form of relief could comply with the Supreme Court's decision short of divestiture. But again, the Department didn't agree, that some consent judgment, as has been done in many cases, could be entered into, some program limiting further expansion, the acquisition of new branches or that there could be a consideration of the competitive environment in the financial community since the consolidation had been effectuated, since Judge Ford found that it was not unlawful, that that could be reviewed and a court could fashion a decree that would leave this institution as it is now and permit, however inhibit, further growth; but the Department would not agree with that. And so, hence, we began these negotiations and I will say to Your Honor since we came into—were consulted about this matter, in I believe May of '64, there have been numerous conferences, there have been constant communication with the officials and counsel here in Lexington, with the Comptroller's office, with the Department of Justice, with the FDIC, trying to evolve and work out a workable solution on this matter. So the order that was presented to Your Honor on February the 16th was the product of patient negotia-

tion and analysis, expert consultation and much discussion. So I want to emphasize that these parties have been diligent in attempting to comply with the Department's view of what the decision of the Supreme Court said. I think I could make a very—at least to me—compelling argument that this decision in and of itself does not require divestiture. There have been many situations where bank mergers have been approved, when the Attorney General has opposed them, of greater magnitude than this and no litigation has resulted. So we think the pattern of the financial community here—and if Your Honor will recall, in this record, before Judge Ford, great emphasis was placed upon the fact that this consolidated institution would give to this community a financial institution of such strength that it could serve the financial needs, its loan limit would be raised, where in this growing and developing area it would not be necessary for borrowers or others who have financial requirements to be served in Louisville or Cincinnati or Cleveland or Knoxville, that there would be an institution here. And I was prepared to try to make that kind of argument, that divestiture under these circumstances was not the relief that was required by the court, nor in our view that the public interest required. But, nonetheless, the Department insisted that we develop this divestiture plan, which has been done with good faith and with diligence and the order which has been presented here by the government today is one which we would accept, of course, and not enter at this time any formal objection, and then proceed with the development of a plan.

Now, Your Honor asked Mr. Williams about the question of distribution of stock. That was the subject of great discussion, of many conferences, much evaluation, with banking authorities and others, and it was concluded that in order to prevent any one particular group of stockholders from suffering injury, that this distribution plan was the one that was the safest to protect

the values that were involved as to individual stockholders and this stock, as the record shows, is very widely distributed and it would mean have to be held by the trustee for a limited period, then it would be distributed to the stockholders of record and there would be the two institutions, to be short, there would be some common stockholders, but as Your Honor knows, there is a turnover and a trading and there's nothing unlawful about me or any other individual acquiring stock in both institutions if it's available and the magnitude and the locus of the control would be such that this would result in what the Department of Justice insists the Supreme Court requires, namely, two separate, competing, financial institutions in this community.

We believe and believe very strongly that this is the plan that offers the greatest possibility of achieving what the Department insists the Supreme Court requires. The appointment of a special master, we have of course vigorously opposed because as Mr. Williams pointed out, that would be the subject of widespread misinterpretation and would result, we think, in very harmful consequences to the public, to the depositors, to the stockholders, and to others. And there is no need, the parties having agreed.

And if I may add, Your Honor, in the not too limited experience that I have had in antitrust matters, where the United States is a party — I asked my partner, Judge Arnold, who used to head the division, and Mr. Kramer who was there for 20 years, and I asked Mr. Williams this morning, if in his experience in a civil antitrust case where the United States was a party, had prevailed, and thereafter the two parties by mutual negotiation offered a form of relief, the court without exception had relied upon the Department of Justice to protect the public values that are implicit in the Sherman Act, and usually unless—I know of no exception where there has been a consent order arranged by negotiation of the parties and the Department,

where it has not been approved and we think that should be the case here, Your Honor.

21 Now, with respect to the show cause order, I think our response to that and the affidavit of Mr. Miles, shows a response to the order entered by Judge Ford, there has been a detailed and meticulous compliance with every requirement of that order. Now, to be sure, the order, as you recall, stated that the books and records should be segregated, maintained separately insofar as practicable and consistent with banking regulations and sound banking practice. I think that the record shows, and Your Honor has seen the submission on that, we have gone much beyond the bare requirements of that order and I think that is going to facilitate to a large degree, if Your Honor enters the order proposed by the government, the ultimate relief that the Supreme Court decision seems to require.

Now, finally, I would hope that Your Honor would give consideration to the pending motions and that the contempt order would be set aside and the parties can then go forward in good faith, attempting to do that which the judgment of the court seems to require us to do.

Thank you.

The Court: Mr. Porter.

Any other attorneys want to be heard?

22 Mr. Mohney: Nothing further.

The Court: The Court feels that a reasonable review of the situation should be suggested by the Court this morning in order that we may arrive at a fair and reasonable plan.

I appreciate the effort of the United States in offering this proposed order. I appreciate the effort of the defense counsel in the presentation made here by Mr. Porter. Nevertheless, I am of the opinion that the gravity of this situation has not fully been appreciated by the defendant. I realize that we are dealing with a delicate situation, a grave responsibility upon this Court, a very very grave

responsibility, to people who are entirely innocent but who have their savings invested in securities which are being handled by this defendant and in their deposits, their trust funds of infants and incompetents, and when we deal with a bank we are dealing with a very, very delicate corporation in the sense of its spiritual value, because it is a corporation with a soul. This is a matter of a sacred trust and I want to say at the outset that personally I have every faith and respect for these men who are in charge of this organization, in charge of this institution, I know them to be, I know them personally many of them and have known them for a great many years, others I know by reputation and I know that they are personally men of character, ability and absolute integrity in fulfilling their obligations as bankers, either as directors or executives.

I will take up first this question of the Court holding the bank and the directors and the executives in contempt, in the order of February the 16th. I do not conclude, as counsel suggests, that in order to enter a contempt that this Court must have initiated an order or a proposal of how to comply with the judgment of the Supreme Court. I do not believe that a court must be put on terms in order to protect itself and I do not think that it was the intention of the Supreme Court, and if it was the intention of the Supreme Court, it is not made clear in their opinion, that it was the responsibility of this Court to initiate and inaugurate a method of placing these two banking institutions in the positions in which they were found to be on the 28th of February 1961. In other words, that before the Court could—to take the position of both the United States and the defendant here—before the Court could hold that a litigant is in contempt, the judge of the Court must first enter an order and that that order must be violated. That is not my judgment of what the authority and power of the Court in the matter of contempt is.

Now, this defendant, in February of 1964 filed an affidavit before the Supreme Court of the United States, an affidavit covering several pages, reviewing the situation, setting out the fact of merger, the tremendous gains, the tremendous gains that this bank, as it stood merged, had achieved, large deposits, numerous trusts, various assets that had been acquired by reason of this merger, which the Supreme Court says has been unlawful since March 1, 1961. And so we start with the proposition that they have by committing an unlawful act made tremendous amount of money. I am not criticizing—don't misunderstand me—the fact that they attempted to merge. They did that in all good conscience I am sure and they were supported in that by the Comptroller of the United States, who authorized the merger, after all statutory and legal requirements were met. After that, a hearing was held before the presiding judge of this court, a very able judge, a hearing was held and he permitted the merger by overruling the motion for an injunction and later on, upon a trial, held that the merger was lawful. Certainly, it cannot be said that these directors and these executive officers were acting in bad faith. They were not. They were acting in good faith, I am sure, and their opinion was vindicated both by the Comptroller of the Currency and by a judgment of this Court. Upon appeal to the Supreme Court, while the decision of the lower court was reversed, nevertheless there were two of the justices of the Supreme Court that sustained the view of these bankers and held that the merger was not in violation of law.

And so I want to make clear that it is with the greatest respect and deference to these gentlemen and to these people who have this matter in charge, that this Court discusses these significant things at this time.

Nevertheless, after the matter had pended before the Supreme Court for some months, after a trial here, and after appeal and after it had gone before the court—that is, I would say it was some months from the time it was

tried and decided in 1962. July I believe, 1962, before it was finally determined by the Supreme Court—an official of the bank filed this affidavit, which among other things said:

"In this three years, the merged bank acquired a minimum of 4,186 new checking accounts that neither bank held at the time of the merger. . . . Thus, the merged bank had a minimum of 4,051 new customers. . . ."

Now, that is while this bank was operating, as the Supreme Court said on May the 4th, 1964, in violation of the law. It further said:

"The merged bank holds 41,937 demand and savings deposit accounts. Thus, a minimum of 20 percent of its present depositors were not customers of either pre-existing bank. . . . If divestiture is ordered, it is a reasonable assumption than an appreciable number of all deposit customers, new and old, would leave both banks."

Now, that is not the Court saying that, this is the head of this institution saying it to the Supreme Court of the United States and swearing to it.

"In the summer of 1961, the problems of trying to maintain separate bookkeeping and posting departments for demand deposits became so numerous and difficult that all such records of the two banks were combined in one department. They have been kept together continuously since that time."

Now, that was a matter of weeks after Judge Ford's order of March the 6th, 1961, directing that it all be kept separate.

"The deposit accounts that were meshed in 1961 were marked to identify the bank of their origin, but ex-

perience shows that this will not solve the problem on any divestiture. . . . If divestiture is attempted here, it is possible that it could produce a 'run on the bank' so common during the depression. . . ."

"The total loans made were related only to the total deposits of the merged bank because no separate records of deposits of either pre-existing bank have been kept."

This started in 1961, the summer of 1961, so this affidavit said.

28 ". . . sound banking and regulatory authorities would require that the amount of the loans be related to the amount of the deposits set aside to each recreated bank."

I could go on here throughout this affidavit. I don't want to prolong my discussion.

"Records are available to show the securities held in the investment portfolios of the two banks at the time of the merger. However, since that time there has been no separation of the investments held by the two pre-existing banks."

"If divestiture is ordered, a real problem exists as to what stock in which bank a shareholder is to receive for his First Security stock. It might appear simple to trace the stock back to one or the other of the pre-existing banks and issue stock in that bank to the shareholder. If this course is followed and the stock is
29 traced back to a shareholder, who owned stock in both banks, there is no way of determining which pre-existing bank the stock came from."

These are representations to the Supreme Court of the United States before it decided the case, the Supreme

Court had all of this before it at the time the case was decided.

> "In such an instance, is the shareholder to receive stock in both pre-existing banks, or, if not, in which of the pre-existing banks is he to receive stock."
>
> "Since the merger the general ledger and account books of the merged bank have been kept without regard to either pre-existing bank. . . ."
>
> "Earnings from loans, securities, trust and real estate commissions, rent and other activities have been commingled without regard to either pre-existing bank. It would have been possible to keep trust earnings separate, but this would have been of little help, since the major part of the total earnings of the bank came from loans and investments which could not be segregated or related to either pre-existing bank. Tax returns have been filed and taxes paid on all earnings as a single unit. The problem of an equitable division of net earnings would be most difficult in the event of a divestiture."

I considered counsel's arguments that they did not consider divestiture as a most reasonable or more reasonable method of complying with the Supreme Court and yet the president of the bank uses the term "divestiture" throughout this affidavit, which was, as I say, before the Court at the time the Supreme Court decided the case.

"For some time, the merged bank has had only one proof and transit department . . . . and one general book and auditing department. The separate personnel of the two pre-existing banks have been combined in single departments."

The Court had that affidavit before it and had knowledge of the affidavit at the time of the order of February the 16th, directing a show cause why Judge Ford's

order of 1961 should not be complied with. According to the statements there, it is certainly reasonable to assume that it was not fully complied with, because it was very explicit in its terms.

Now, the only way to divest is to divest. A year ago, almost—it will be within a matter of three weeks—this defendant was directed by the Supreme Court to divest, the Court wasn't directed to divest the defendant, but the defendant was directed to divest. There was no order of the Supreme Court, no intimation in the opinion, no refference was made in the opinion to this trial court at all. The directive was to the defendant. Nothing was done about that, no effort was made. The defendant and its officers, and I assume its attorneys, all men, as I say, of ability and integrity and experience, seem to satisfy themselves by using an expression which is filed in a recent affidavit by the same affiant that made the affidavit I have been reading from, in which he says:

"... the problem of 'unscrambling the egg,' or re-creating two banks from the business of one"
is presented.

From the affidavit I have just read, it would appear that the term—to use it, if you want to bring slang into this case—the "scrambling the eggs", was a very appropriate term. It was the very thing that the order of March 6, 1961, sought to prevent in an equity court, a court of justice, in a court that was seeking to do equity between all parties, permitted the merger on the promise that there would be no "scrambling of eggs". And so, after the decision of the Supreme Court was handed down, nothing was done. As I say, it seemed to have been the impression, "Well, what can you do about it? What can the court do?"

The Court can't do anything as far as taking the physical facts and undertaking to comply with the order or with the judgment of the Supreme Court. It is for the defendants to do that. The Court has done no wrong. The Court

has not violated the Sherman Act. The Court has set here assuming under its order of March 6 that these things were in such a condition that in a matter of weeks these institutions could be identified and proceed as they did before the merger.

A similar case to this in New York, if I may judge from the press, today, where a judge had held the case under advisement for three years. I am not critical of that, because I am sure that as busy as the courts are, that in a case of that magnitude evidently he got to it as quickly as he could, but he held the case under advisement for three years and he directed them to make a showing within 10 days.

In this case, the mandate, which is a directive, came down and was filed on May the 4th and nothing was done until the Court took the initiative and directed a report would have to be made by September the 1st, and it was on July the 1st, I believe, that the order was entered. And according to counsel here, the defendant then submitted a plan to the United States Department of Justice that was not accepted by the Department. It is referred to in this response that this Court does not have the power to hold in contempt or find the contempt of another court. That is not what this Court is doing. When that mandate is filed in this Court, that is an order to this Court and of this Court and the Court feels that it is justified to believe from all the facts and all of the showing from this record and in light especially of the statements which I am just in a few minutes going to read to you, that this bank and its directors and executive officers have been dragging their feet and temporizing with the Court, which I consider a contempt of Court. And I further hold that it does not have to rest on any express, written order of court in order to be a contempt.

34

This bank has continued to make money by reason of this unlawful operation, sending out literature, even today sending out literature, advertising the First Security Na-

tional Bank and Trust Company and all of the things that it offers to the investing public, just as if there had been no judgment of the court, opening a new branch office, election of directors, all of the things which certainly are the whole purpose of the law, that they should not in an unlawful enterprise take advantage of their competitors. Well, they are continuing to do it. They are doing it now. And that is the whole purpose of the Sherman law. If they are going to permit the Sherman law to be treated in that way, and when a person is found to be in violation of the Sherman law—which is a criminal statute, fixing a penalty—and if those who violate the Sherman law are going to be continued for weeks, months, and according to Mr. Porter's statement here this morning, even for years, and according to the plan submitted, 10 years more, the plan submitted on the 16th of February, then the Sherman law is of little value. The evils supposed to have come from the unlawful merger in being unfair competition would have put the competitors out of business in 10 years. If the bank grows as is indicated by this affidavit before the Supreme Court, in February of 1964, there won't be any competition. That was the reason for the judgment, that it created a monopoly and unlawful competition and yet we have permitted that now, that unlawful competition has been in process to the great benefit of the defendant, a violator of the law for four years, and they seek now to continue it on.

As I say, gentlemen, I don't want to give the impression that I am saying this, especially undertaking to be critical just for the sake of being critical, because I am not. I am here for the sole purpose of asking you to give me your full and wholehearted cooperation in trying to do this and if you had started with that last May, it would have already been done. I am convinced of that. I am convinced of it definitely, and I feel that there has been an imposition upon the Court, a reflection upon the Supreme Court and upon this Court, a careless attitude in the field of banking, and a discredit to this community.

It is said that this case is a new kind of case, that there never was a case before where two merged banks were required to demerge, and we here in Lexington are
36 called upon to set an example, we are given an opportunity to register another first. We are quite pleased with our firsts here in Central Kentucky and we were given an opportunity as bankers to put this thing on a high plane and to get it done in a banking sort of a way and in a responsible sort of a way.

I realize full well why there is no point in going into this in great detail now. I am fully aware that the best way to do this is by those in charge now and not to appoint a special master. I don't want to do that and I don't propose to do that. I am going to trust you men to carry this out in the letter and in the spirit of the law. But the law must be obeyed and my order directing you to show cause why a special master should not be appointed brought results. It would cost a million dollars and maybe more for a special master to go into the bank and it might even necessitate closing the bank temporarily and employing sufficient auditors and accountants to do the thing that you are equipped to do there this morning. It would require weeks and months. This is a big financial institution, one of the biggest in the country, relatively speaking, for a community, certainly for states like Kentucky.

37 I am not saying these things in the spirit, as I say, of trying to belittle you. I don't do that, I won't do that, I would not for anything because I have faith in you. I was very much in hopes instead of talking about, "We can't unscramble eggs," that you would talk that we could unscramble what eggs have been scrambled and that you would do it.

The power of this Court is unlimited. Those of us who are commissioned to serve as trial judges, our power is greater possibly than any other single official in the United States. The Court has the power to close that bank, in order to carry out the judgment of the Supreme Court.

The Court has the power to fine this bank a substantial sum of money—I mean a substantial sum of money relatively speaking, in accordance with what its assets are. The Court has the power to appoint a special master and the Court has the authority and the power to absolutely regulate every step that is being taken there to carry out this judgment in this case. I know that it is unnecessary to do that. I am confident that it is unnecessary to do that if I cant find some attitude of mind, some big-mindedness in this thing, some big-mindedness, "This is the law.

"We've got to do it," not an attitude of, "You
38 can't unscrambled eggs." "Well, here we are, come and get us if you can." And to go on and counsel suggested this morning, the plan of the bank was that they wouldn't demerge at all, just go on as they were, with certain brakes and limitations on some of the things that they might do. I can't agree with the gentleman that that is the fulfillment of a holding that the Sherman law has been violated. The Court has the further authority to refer this matter to the grand jury, which, of course, I don't propose to do. This bank is capable of demerging in a matter of weeks and I am not minimizing the problems. If we had been as busy these past 11 months trying to demerge as we have to try to keep from demerging, this would have been accomplished before the Christmas holidays, I am confident. And I feel that I am justified in making that statement by the affidavit filed in this case in support of the responses filed to the show cause order. That affidavit was filed on March the 2nd and I accept it verbatim because it is made by an honorable gentleman and a capable banker and one who is in a position to know what he is talking about. And he says this in summary:

"The record kept and maintained are more than ade-
39 quate to identify all notes, accounts, loans and other transactions with customers, "both before and since March 1, 1961; and fully comply with the order of March 6 in every detail."

"As to qualifications prior to March 1, 1961, detailed records have been kept and maintained showing which of the consolidated banks originally qualified as fiduciary; and as to qualifications since said date, the records show which bank was named and which trust department is carrying out the duties of the fiduciary.

"In short, each trust department has continued to operate since the merger as a separate, distinct, fully staffed trust department as they were before the merger."

That is certainly not the tenor of the affidavit filed before the Supreme Court in February 1964.

"The records of the two trust departments are fully adequate to show:

"1) The trust accounts held by Security on February 28, 1961;

"2) The Trust accounts in which old Security was named by the settlor or testator as fiduciary;

40 "3) The trust accounts acquired by the trust department of old Security since the merger;

"4) The trust accounts held by First National on February 28, 1961;

"5) The trust accounts in which old First National was named by the settlor or testator as fiduciary;

"6) The trust accounts acquired by the trust department of old First National since the merger.

"No trust business has ever been handled at any of the branches either before or since the merger."

"It has kept and maintained records showing which of the new accounts, opened since February 28, 1961, were opened at the main office of old First National or any of its branches, and which were opened at the main office of old Security or at its branch."

"The difficulty in divestiture in this field is not that of identifying the accounts. It is simply that neither the bank nor the court can control the freedom of a
41 depositor to move the "account when and where he pleases."

That is definitely true. To just guarantee that, no one, no bank in town or any other town, can say where a depositor may decide to change today or within an hour to do his business. That is no excuse for not demerging banks.

"In record keeping and in account identification, the bank has gone much further than the order required. There is no problem of identification and physical separation of all accounts whenever acquired."

What more do we need to comply with the Supreme Court's judgment? I have not read all of that affidavit. It was a very gratifying affidavit, gratifying to me, because it seemed in my judgment to relatively simplify what we are trying to do here.

It would serve no purpose for me to prolong my discussion. I realize that what I may have said here, some of you may think would have better been said in chambers to lawyers. Well, I have never practiced that since I have been on the bench. I have felt that the business of the court is the business of the public and I have never liked the idea of the judge and the lawyers going into the judge's chambers to discuss involved questions, even though they may appear to be solely legal, because they are not
42 always things of which the court as a court—and that's the judge on the bench—should not take the public into his confidence. There are hundreds of people who are definitely concerned about this and I am sure that they will be gratified eventually knowing that everything has been handled in such a way as to justify their confidence in this institution and that these two banks as they did for years before—I think the First National was organ-

ized as it existed on February the 28th, back in 1929. That was a result of a merger, as I recall. But these two banks have served with distinction, they have been headed by great men, great Lexingtonians, great Kentuckians. I want us to do as I said a few minutes ago, to establish another first for our state and for our court, for our bankers.

So, I propose to leave these men in charge. I am not going to appoint a special master, certainly not at this time. I read with interest your brief, which was nothing more than a very helpful recitation of authorities which are pretty well known. Special masters are never used except under extreme conditions. I felt the order that I entered on February the 16th was justified since it was 10 months after and apparently no genuine effort,
43 as I felt, had been made to comply.

I have prepared here orders which may need modification, may need changing—probably will—may need further explanation. The Court will always be here available. As I said a few minutes ago, the only way to demerge is to demarge. The orders of this Court must be obeyed, irrespective of anything, and they must be obeyed with a minimum of delay. I feel that the Court has been most tolerant. It is not a matter of patience. It is a matter of judicial integrity. The integrity of this Court is the most important thing in the world. I offer you these orders more in the nature of an endeavor to help you than in an attitude of criticism, with the full belief that you will to the best of your abilities—and that's a lot of ability, I'll tell you—demerge these banks without further delay.

"The Supreme Court of the United States held the consolidation of the Security Trust Company into the First National Bank and Trust Company of Lexington, which resulted in the formation of the First Security National Bank and Trust Company of Lexington, to be in violation of Section 1 of the Sherman Act. Its judgment, filed May 4, 1964, reversed the judgment of this Court and

"remanded this cause for proceedings in conformity with its opinion.

"It is ORDERED, ADJUDGED AND DECREED as follows:

I

"Defendant, First Security National Bank and Trust Company of Lexington, shall without delay take all necessary steps to create a separate, competitive and independent commercial bank which shall be the equivalent of the former Security Trust Company at the time of its consolidation with the former First National Bank and Trust Company of Lexington, including, but not limited to its name, its directors, its officers and personnel, its offices, furniture and equipment, its capital surplus and undivided profits, and loans, savings, checking and trust accounts, plus its proportionate share of any increments and improvements since that date. Subject to such limitations on the eligibility of stock to be voted as may be appropriate to insure the independence of operation of the banks, all of the capital stock of the banking association to be created by the defendant, First Security National Bank and Trust Company of Lexington, shall be issued in the name of a corporate trustee to be held by it until directed by order of this court to be distributed to the proper shareholders.

"There shall be no interlocking directorates or identity of personnel on any level between the present banking institution and the new banking institution to be created."

Now, that might require a little further explanation. It is the purpose of the order that there shall be no identity of personnel between the old First National and the old Security Trust Company in their new identities.

II

"The directors of First Security National Bank and Trust Company who were directors of First National Bank

and Trust Company and those who were directors of Security Trust Company will constitute the directors of their former institutions until such time as stockholders elect directors. Directors who were elected since the merger for the first time will lose their directorships.

III

"The First Security National Bank and Trust Company of Lexington shall without delay change its name to First National Bank and Trust Company of Lexington. It shall destroy all blank stationery, checks and records bearing the name First Security National Bank and Trust Company of Lexington. It shall cease conducting any advertising in the name of First Security National Bank
46 "and Trust Company of Lexington. It will remove from any real estate it occupies the name First Security National Bank and Trust Company of Lexington.

IV

"The United States Department of Justice shall have authority to examine and inspect all the record of the defendant, First Security National Bank and Trust Company of Lexington, as presently named, or First National Bank and Trust Company of Lexington after the name is changed as herein directed, for the purpose of being advised that it is complying with the provisions of this order. The Department shall be kept fully advised by the Bank as to the progress made in fulfilling the purpose of this order.

V

"The purpose of this order is to establish competitive banking between the institutions involved as it existed prior to the unlawful merger on March 1, 1961. Any effort to circumvent that purpose on the part of any individual or corporate institution will be treated as a contempt of this court.

VI

"Jurisdiction is retained for the purpose of enabling any of the parties to apply to this Court for "such
47 orders and directions as may be necessary for the construction or carrying out of this order, for the modification of any of the provisions hereof, for the enforcement of compliance herewith and for the punishment of violations hereof."

Separate order:

"The response to the order of this court to show cause why a special master should not be appointed is sufficient. The motion of the plaintiff filed on March 1, 1965 asking that the appointment of a special master be withheld at this time is therefore sustained.

"The response to the order to show cause why the defendant, First Security National Bank & Trust Company of Lexington, its officers and directors, should not be held in contempt for violating the order of this court of March 6, 1961 is sufficient and is sustained.

"The motion of the plaintiff of March 1, 1965 to enter the order of divestiture attached to the motion is overruled.

"The motion to set aside the order of contempt is overruled.

Mr. Marshall you may recess court.

48 Mr. Porter: In connection with Your Honor's denial of our motion to set aside the contempt order, we would like to file a motion for stay pending appeal of that order.

The Court: It may be filed.

Now, that order provides for fine of a hundred dollars a day until the divestiture is effected. And I don't want to enter any order now changing that ruling.

Mr. Porter: Well, today would be the last day if we appeal to the Sixth Circuit, because the order was 30 days.

The Court: Yes.

Mr. Porter: So we file our notice of appeal and this is a motion for stay, which is jurisdictional, and would like for you to fix the bond.

The Court: Well, motion of stay of execution to recover the amount now due, I'll sign that order, but not an order to stay the further fine, not to change the order of fine.

Mr. Porter: Well, that is what we are appealing, what we will appeal.

The Court: That's what you are appealing. You want to find out the validity of that order.

49 Mr. Porter: Because we don't know what order we are in contempt of.

The Court: Sir?

Mr. Porter: I say we don't know what we are in contempt of.

The Court: All right. I tried to explain it to you, in what I said a few minutes ago.

Mr. Porter: Well, all of these actions were taken on advice of counsel, in trying to negotiate this order.

The Court: Very well. I'll examine your proposed order. I don't think you need any order if you want to take an appeal from that order, you may prosecute your appeal, if you bring it within the prescribed time, but I see no reason for a stay of execution. There will be no execution issued to require it to be paid at this time. As a matter of fact, if the orders of the court are complied with, there may be a modification of it, but I am not going to make any change in that order at this time.

Mr. Porter: Well, we want to preserve our right.

50 The Court: All right. You have your right. You file your motion then, whatever it is, and I will examine it, but I don't know that you need any stay of execution if you prosecute an appeal and execute supersedeas bond.

Mr. Porter: Yes, we wanted to fix the bond even though we don't know what it will be.

The Court: All right. I will fix the bond at $500.

Mr. Porter: Thank you, sir.

The Court: Anything further, gentlemen? Anything further, Mr. Porter?

Mr. Porter: No. It is suggested that you approve the surety.

The Court: Without surety.

Mr. Porter: Without surety?

The Court: Yes.

Anything further, Mr. Williams?

Mr. Williams: Nothing, Your Honor.

The Court: Gentlemen, any of you? Anyone else?

Mr. Marshall, you may adjourn court

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, and FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, *Defendants*

Order

The response to the order of this court to show cause why a special master should not be appointed is sufficient. The motion of the plaintiff filed on March 1, 1965 asking that the appointment of a special master be withheld at this time is therefore sustained.

The response to the order to show cause why the defendant, First Security National Bank & Trust Company of Lexington, its officers and directors, should not be held in contempt for violating the order of this court of March 6, 1961 is sufficient and is sustained.

The motion of the plaintiff of March 1, 1965 to enter the order of divestiture attached to the motion is overruled.

The motion to set aside the order of contempt is overruled.

Mar. 18, 1965

MAC SWINFORD, *Judge*

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. 36—October Term 1963

UNITED STATES, *Appellant,*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, ET AL.

APPEAL FROM *the United States District Court for the Eastern District of Kentucky.*

THIS CAUSE *came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Kentucky, and was argued by counsel.*

ON CONSIDERATION WHEREOF, *It is ordered and adjudged by this Court that the judgment of the said United States District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Kentucky for further proceedings in conformity with the opinion of this Court.*

April 6, 1964

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, and FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, *Defendants*

Order

By final order of July 27, 1962, this court adjudged that the merger of the First National Bank and Trust Company and Security Trust Company did not constitute a combination in unreasonable restraint of trade or commerce in the field of commercial banking and did not violate Section 1 of the Sherman Act; that the merger of the First National Bank and Trust Company and Security Trust Company was not an unlawful combination to monopolize, or an unlawful attempt to monopolize, interstate trade or commerce in the field of commercial banking in violation of Section 2 of the Sherman Act.

Upon appeal from this judgment to the Supreme Court of the United States, the judgment of this court was reversed and on April 6, 1964, the Supreme Court of the United States handed down an opinion in which it stated that the elimination of competition between the two banks was a violation of Section 1 of the Sherman Act. In conformity with the decision, the Supreme Court issued its mandate on April 6, 1964 and directed that this cause be remanded to this court for further proceedings in conformity with its opinion.

The mandate was received and filed on May 4, 1964. No steps of record have been taken by the defendants or any of them to comply with the directive.

The defendants are given to and including September 1, 1964, to report to the court the progress made in complying with the judgment.

MAC SWINFORD, *Judge*

July 1, 1964

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, and FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, *Defendants*

Order

On the joint motion of the plaintiff and the defendants herein, it is ordered by the Court that the defendants are given to and including December 1, 1964, to report the progress made in complying with the Mandate of the Supreme Court.

MAC SWINFORD, *Judge*

Aug. 25, 1964

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, et al., *Defendants*

Order

This case came on to be heard pursuant to order of October 6, 1964. A document was filed designated as "Objections of Defendant to Petition and Motion for Intervention". The Court considered the Petition for Intervention and the Objections and all other matters raised at the hearing. The United States was represented by Larry L. Williams, Attorney, Department of Justice, the intervenor was represented by Frank Ginnochio and Sidney White, and the defendant, First Security National Bank & Trust Company was represented by John L. Davis, Gladney Harville, Rufus Lisle and C. M. Harbison.

The Court heard argument of counsel and being advised, It is ORDERED AND ADJUDGED that the intervening petition filed on September 29, 1964 and the amended petition and motion for intervention filed on October 10th be made a part of the record in this case.

It is further ORDERED that the intervenor shall not be permitted to participate in any negotiations now being effected or in progress between the parties, and the parties to the action upon reaching any agreement or agreed judgment may present same to the Court without consulting the intervenor or any other person.

It is further ORDERED that upon presentation to the Court of any judgment or any report of the negotiations between

the patries for the purpose of carrying out the Mandate of the United States Supreme Court and before such judgment is finally entered a period of thirty (30) days will be had in order to give the intervenor opportunity to examine the proposed entry and to offer any legal reason why it should not be entered by the Court. This does not mean that any written notice will be given to the intervenor or any other person of the receipt by the Court of any such proposed judgment.

This order shall not be construed as making the intervenor a party litigant herein, or require either the United States or defendants to further plead or respond to the intervening petition.

MAC SWINFORD, *Judge*

October 12, 1964

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, and FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, *Defendants*

Order

On the joint motion of the plaintiff and defendants herein, it is ordered by the Court that the defendants are given to and including January 11, 1965, to report the progress made in complying with the Mandate of the Supreme Court.

MAC SWINFORD, *Judge*

Nov. 19, 1964

APPENDIX J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, and FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, *Defendants*

Order

On the joint motion of the plaintiff and defendants herein, it is ordered by the Court that the defendants are given to and including February 16, 1965, to report the progress made in complying with the Mandate of the Supreme Court.

MAC SWINFORD, *Judge*

January 11, 1965

APPENDIX K

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

Civil No. Lex 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, et al., *Defendants*

Stipulation

[Filed February 16, 1965]

The parties hereto hereby stipulate that if the Plan of Divestiture outlined in the attached proposed Interlocutory Decree is accomplished substantially as the parties

hereto presently anticipate (including, in the case of defendant First Security National Bank, a ruling from the Internal Revenue Service that the Plan of Divestiture will result in tax free transactions, exchanges and distributions to all parties including its shareholders) and in accordance with the proposed Interlocutory Decree, said Decree would be appropriate under the Supreme Court's mandate entered herein on May 1, 1964. Accordingly, the parties hereto recommend that this Court enter the attached Interlocutory Decree.

Dated:

FOR THE PLAINTIFF:

/s/ LARRY L. WILLIAMS
Larry L. Williams

W. D. KILGORE, JR.
William D. Kilgore, Jr.

/s/ MELVIN SPAETH
Melvin Spaeth

LAWRENCE F. NOBLE
Attorneys, Department of Justice

FOR THE DEFENDANTS:

STOLL, KEENON & PARK
By /s/ GAYLE MOHNEY

HARBISON, KESSINGER,
LISLE & BUSH,
By /s/

ARNOLD, FORTAS & PORTER
By PAUL A. PORTER

VICTOR H. KRAMER
Victor H. Kramer

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

Civil No. Lex 1424 Entered

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, et al., *Defendants*

Interlocutory Decree

The Supreme Court of the United States, by its opinion dated April 6, 1964, having reversed the judgment of this Court entered in this cause on July 27, 1962 dismissing the Complaint herein, and the mandate of the Supreme Court having been filed in this cause on May 1, 1964:

NOW, THEREFORE, it is hereby:

ORDERED, ADJUDGED and DECREED as follows:

I

The consolidation of the defendant Security Trust Company into the First National Bank and Trust Company of Lexington, as charged in the Complaint herein, is a violation of Section 1 of the Sherman Act, 15 U.S.C. Sec. 1.

II

The provisions of this Interlocutory Decree applicable to any defendant shall apply to such defendant and to each of its subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with them who receive actual notice of this Decree by personal service or otherwise.

III

Within six months from the date of entry of this Interlocutory Decree, First Security shall file with this Court

after notice to plaintiff a Plan of Divestiture for the creation and establishment by First Security out of its assets and otherwise a sound, independent commercial banking association with trust powers in Lexington, Kentucky to be organized under the laws of the Commonwealth of Kentucky as a state bank and trust company and to be known as Security Trust Company. First Security shall thereupon change its name to First National Bank and Trust Company of Lexington. The Plan of Divestiture shall provide that, except for qualifying shares, all of the capital stock of the new banking association to be created by First Security shall be issued to and held by a Trustee for the use and benefit of the shareholders of First Security in exchange for that portion of the assets of First Security transferred by it to the new banking association. The Trustee shall be such person or corporation as the parties may mutually agree upon and as the Court may approve, and in the absence of such agreement, as the Court may designate. The Trustee shall have the sole voting power of all of the capital stock of the new banking association until the same is distributed as herein provided.

Upon the written request of First National and the new banking association, or if they do not agree, then upon the order of this Court, and on notice to the plaintiff, but in any event within one year from the creation of the new banking association and the issuance of its capital stock to the Trustee, the Trustee shall distribute the capital stock of the new banking association pro rata to the shareholders of First National unless upon petition of any party the Court for good cause shown may enter an order extending the duration of the Trusteeship.

The Plan of Divestiture shall further provide that the new bank to be created by First Security shall be, as far as practicable, the competitive equivalent of the defendant Security Trust at the time of its consolidation with the defendant First National, including, but not limited to

directors, officers and personnel, offices, furniture and equipment, capital, surplus and undivided profits, and loan, savings, checking and trust accounts, plus its proportionate share of any increments and improvements since that date. Upon receipt of said Plan, this Court will set a date for a hearing upon whether said Plan should receive the tentative approval of this court.

IV

After this Court has tentatively approved a Plan of Divestiture, the defendant First Security shall take all reasonable steps to secure such consents of bank regulatory agencies as may be involved in the establishment of said new Security Trust Company, including a commitment for insurance of deposits by the Federal Deposit Insurance Corporation. Unless sooner accomplished, defendant First Security is ordered and directed to submit monthly reports to this Court, with a copy to the plaintiff, setting forth the status of its request for such consents. Upon obtaining such consents, the defendant First Security shall promptly so notify this Court which will then set a date for a hearing on the final approval of the Plan of Divestiture and the entry of such orders and directions as may be necessary to carry out such plan.

V

Upon its formation, the new Security Trust Company shall submit to the jurisdiction of this Court in this matter and shall execute its consent to be bound by the terms of this Decree and all subsequent Orders entered in this matter.

VI

The Plan of Divestiture shall provide for the new Security Trust to be in operation as a separate and independent commercial bank competitive with the First National Bank and Trust Company as promptly as possible

after the Plan of Divestiture receives the final approval of the Court, but in no event more than three months after such approval by the Court, unless after notice to plaintiff and an opportunity to be heard thereon, defendant shall establish that notwithstanding the exercise by it of due diligence, additional time is necessary. It shall be the intent of the Plan of Divestiture that new Security Trust shall be a sound commercial bank independent of First National Bank and Trust Company at the earliest feasible time in accordance with Section III of this Interlocutory Decree.

VII

Upon completion of the Plan of Divestiture:

(A) Each bank is enjoined and restrained from acquiring directly or indirectly any of the assets of or any of the stock of the other provided, however, that nothing in this Section VII shall prevent either First National Bank and Trust Company of Lexington or Security Trust Company from acquiring assets from the other in the ordinary course of business, or from acquiring capital stock of the other in the regular course of securing or collecting a debt previously contracted in good faith or under circumstances where the stock is transferred to the bank acting in a fiduciary capacity (including agency accounts), but in no event shall either bank purchase capital stock in the other bank in any capacity, fiduciary or otherwise;

(B) Each bank is thereafter enjoined and restrained from having as one of its officers, directors or employees any person who is at the same time an officer, director or employee of any other bank in Lexington, Kentucky;

(C) To assure the independence of operation of the banks, each bank shall for a period of ten (10) years provided plaintiff reasonable notice and an opportunity to apply to the Court for such orders as may be necessary concerning the manner in which the bank proposes to vote those shares of the other bank held in its trust department

not treated, pursuant to the provisions of Section VII(1) hereof, as stock held by the beneficial owners. Each bank shall also take all such steps as may reasonably be required to secure the instructions of the beneficial owners of such shares concerning the manner in which such shares are to be voted.

(D) The by-laws of each of the banks shall contain limitations on the eligibility for voting, in any election of directors or plan of merger or consolidation, of those shares in excess of 1% of its outstanding shares which are owned or controlled, directly or indirectly, by any stockholder who owns or controls, directly or indirectly, more than 1% of the outstanding shares of the other bank. The by-laws shall further provide that shares held in the trust department of any bank or trust company in a fiduciary capacity shall be treated as owned or controlled only by the beneficial owner thereof when voted by a co-trustee not associated with the bank or trust company or where the bank or trust company has notified in writing the beneficiaries of the trusts requesting their instructions as to voting and has received written instructions from the beneficiaries concerning the manner in which such stock is to be voted and votes such stock in accordance with such instructions. The bank or trust company may, subject to the provisions of Section VII(C) hereof, exercise such voting power as has been given by the trust instrument if the beneficiaries shall fail to respond to the timely request of the bank or trust company for instructions as to voting, or if there is no living beneficiary competent to give such instructions.

VIII

For the purpose of determining or securing compliance with this Decree, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice

to any defendant, made to its principal office, be permitted, subject to any legally recognized privilege:

(A) Access, during office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any matters contained in this Decree except reports of examinations conducted by the Comptroller of the Currency or his agents and correspondence directly relating to the contents thereof; and

(B) Subject to the reasonable convenience of such defendant and without restraint or interference from it, to interview officers or employees of such defendant, who may have counsel present, regarding any such matters.

Upon such written request, said defendant shall submit such reports in writing with respect to any of the matters contained in this Decree as may from time to time be necessary for the enforcement of this Decree.

No information obtained by the means provided in this Section VIII shall be divulged by any representative of the Department of Justice to anyone other than a duly authorized representaative of the Executive Branch of the plaintiff, except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Decree or as otherwise required by law.

IX

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Decree to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Decree, for the modification of any of the provisions hereof, for the enforcement of compliance herewith and for the punishment of violations hereof.

Dated: ....., 1965

United States District Judge

APPENDIX L

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON.

No. 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, and FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, *Defendants*

Order

It is noted of record that the defendant, the First Security National Bank and Trust Company of Lexington, and its component corporate entities, First National Bank and Trust Company of Lexington and the Security Trust Company, have failed to comply with the mandate of the Supreme Court issued by that court on April 6, 1964 and filed of record in the United States District Court for the Eastern District of Kentucky on May 4, 1964.

On July 1, 1964, the court, noting that no steps had been taken by the defendants to comply with the mandate of the United States Supreme Court, entered an order directing that a report should be made to the court on the action if any taken by September 1, 1964.

Subsequently, at the joint request of all parties, the court on August 25, 1964 extended the time for making a report to September 1, 1964. Again on September 19, 1964, at the joint request of the parties, the court entered an order extending the time for making a report to the court to January 11, 1965. Again on January 11, 1965, the court, at the joint request of the parties, extended the time to make such report to February 26, 1965.

The extensions were given upon representation to the court by the parties that they were endeavoring to effect a comprehensive separation of the business between the First National Bank and Trust Company of Lexington and the Security Trust Company.

It now appears that the defendants have not effected a separation of the business of the two banking institutions as required under the judgment of the Supreme Court.

The defendants, First Security National Bank and Trust Company of Lexington, First National Bank and Trust Company of Lexington and the Security Trust Company, are ordered to show cause why this court should not appoint a special master to take over the books and records of the three banking institutions and to separate the businesses of the First National Bank and Trust Company of Lexington and the Security Trust Company and to place these institutions in the same position they were respectively, insofar as their business interests were concerned, as of the date of the merger, to-wit, March 1, 1961. The parties will show cause why all allowances for fees, salaries and expenses incurred by the special master should not be borne by the defendants.

It is further ordered that the defendant, First Security National Bank and Trust Company of Lexington, in its corporate entity, and its executive officers and directors as individuals, will show cause why they should not be held in contempt of court for failure to comply with the order of this court of March 6, 1961.

The parties to whom this show cause order is addressed are given until Tuesday, March 2, 1965 at 4:00 P.M., to file a response to this order.

A copy of this order shall be served by registered mail from the clerk of the court to the First Security National Bank and Trust Company of Lexington, its attorneys of

record, and to its individual executive officers and directors.

MAC SWINFORD
Mac Swinford, *Judge*

February 16, 1965

APPENDIX M

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 1424

UNITED STATES OF AMERICA, *Plaintiff*

v.

FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, and FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, *Defendants*

Response to Order to Show Cause

[Filed March 2, 1965]

On February 16, 1965, this Court entered an order directing the defendant First Security National Bank and Trust Company of Lexington (hereinafter "First Security") as follows:

1. To show cause why this Court should not appoint a special master to (a) take over the books and records of First Security as well as those of First National Bank and Trust Company of Lexington (hereinafter "old First National") and Security Trust Company (hereinafter "old Security"), (b) to separate the businesses of old First National and old Security, and (c) to place these institutions in the same position they were respectively, insofar as their business interests were concerned, as of March 1, 1961.

2. To show cause why all allowances for fees, salaries and expenses incurred by the special master should not be borne by the defendants.

3. To show cause why First Security, in its corporate entity, and its executive officers and directors, as individuals, should not be held in contempt of court for failure to comply with the order of this Court of March 6, 1961.

A response to the order to show cause was required to be filed by 4:00 P.M. March 2, 1965.

SUMMARY OF RESPONSE

1. The appointment of a special master is not necessary to effect a divestiture because the parties are ready, willing and able to put a plan of divestiture into effect at the earliest possible time consistent with sound banking practices, the rules and regulations of applicable federal and state bank regulatory authorities, the safety of depositors' accounts, and the protection of the bank's shareholders.

2. Rule 53(b), Federal Rules of Civil Procedure, provides that reference to a special master shall be the exception and not the rule, and shall be made only upon a showing that some exceptional condition requires it. Notwithstanding that the Court declined to enter the Interlocutory Decree providing for a plan of divestiture which both plaintiff and defendant agreed upon and recommended to the Court as being in compliance with the Mandate of the Supreme Court, the parties have demonstrated that they can work out an agreed Plan of Divestiture and there is every reason to believe that it can and will be done. Therefore, no exceptional condition exists which authorizes the appointment of a special master within the aforesaid Rule 53(b).

3. A special master could not separate the business of First National Bank and Trust Company of Lexington and the Security Trust Company and place these institutions in the same position they were respectively as of the date of the merger, because upon the consolidation of Security Trust and First National into First Security a new national banking association was created and all rights, franchises and interests in property subject to existing liabilities of both consolidating banks were transferred to the new National Banking Association, and thereupon First National and Security Trust ceased to exist as separate banks.

4. This Court has jurisdiction to enter an Interlocutory Decree of the sort proposed by the parties and tendered to the Court and to retain a measure of supervision over the conduct of the defendant during the effectuation of that decree.

5. First Security, its officers and directors, have complied scrupulously with both the letter and spirit of the order of this Court entered March 6, 1961. This full compliance, however, while making the task of effecting divestiture easier, does not solve many other difficult and sensitive problems arising from the passage of time and the legal effect of the consolidation.

I. Background

A. *The Consolidation*

On February 27, 1961, the Comptroller of the Currency approved the consolidation[1] of the First National Bank and Trust Company of Lexington and the Security Trust Company. Pursuant to the plan approved by the Comptroller, the consolidation was consummated at the opening of business March 1, 1961. Later on in the day, the United States filed the Complaint herein charging that the consolidation violated Sections 1 and 2 of the Sherman Act. The complaint asked for preliminary and permanent injunctions to prevent consummation of the merger. On March 2, 1961, the government filed a motion for a temporary restraining order to prevent any further steps to effect the consolidation pending the Court's disposition of the re-

---

[1] The national banking laws contemplate that in a "consolidation" of two banks a new corporate entity results, which assumes the rights, assets and liabilities of both consolidating banks. Approval of the stockholders of both banks is required for a consolidation. In a "merger," however, no new entity is created. A constituent bank is merely "absorbed" into a receiving bank and the two thereafter continue in existence under the pre-existing charter of the receiving bank. Only the approval of the stockholders of the constituent bank is required to effect a merger. *Compare* 12 U.S.C. § 215, *with* U.S.C. § 215a.

quest for a preliminary injunction. On March 6, 1961, the motion for a temporary restraining order was brought on for hearing.

Following the hearing on March 6, 1961, the Court entered an order which, after recognizing in the preamble the fact of consolidation of the two banks into First Security as a National Banking Association under the laws of the United States, provided, in relevant part, as follows:

> "1. That defendant, First Security National Bank and Trust Company of Lexington, as a National Banking Association under the laws of the United States, is duly authorized to conduct and carry on a banking business in Lexington, Kentucky;
>
> "2. Until the further orders of the Court, the defendant, First Security National Bank and Trust Company of Lexington, shall insofar as may be reasonably possible under the national banking law of the United States and the applicable regulations of the Comptroller of the Currency, the Federal Reserve Board and the Federal Deposit Insurance Corporation, and in accordance with sound banking practices, keep and maintain its assets, liabilities, internal records and accounts in such manner that in the event the consolidation is ultimately adjudged to be dissolved and a separation is ordered, its capital stock, assets, liabilities and accounts can be equitably divided between the consolidating banks in accordance with their respective rights;
>
> "3. Pursuant to paragraph 2 hereof, defendant shall:
>
> "(a) Keep and maintain stock ledgers and records adequate to show which shares of stock in the consolidated bank have been or are issued in exchange for stock in each of the consolidating banks and preserve all stock certificates of the consolidating banks received in exchange therefor;
>
> "(b) Keep and maintain trust records showing which of the consolidating banks was named by the settlor or testator as the fiduciary; and as to quali-

fications prior to March 1, 1961, showing which of said consolidating banks originally qualified as fiduciary;

"(c) Keep and maintain records adequate to identify which of the accounts in the consolidated bank were maintained in each of the consolidating banks as of the close of business February 28, 1961;

"(d) Keep and maintain records adequate to identify all equipment, materials, employees, and real or personal property, investments and securities belonging to each of the consolidating banks or their customers as of the close of business on February 28, 1961;

"(e) Keep and maintain records adequate to identify all notes and other obligations held by each on the consolidating banks as of the close of buisness on February 28, 1961;

"(f) Keep and maintain the present Trust Departments of the consolidating banks as at February 28, 1961, at their present locations and with substantially the same personnel;

"(g) Keep and maintain records adequate to identify which accounts, notes, loans and other transactions are had with customers who were not customers of either of the consolidating banks prior to March 1, 1961."

Subject to this order, however, the consolidation, which had in fact been consummated at the opening of business March 1, continued in effect. The new consolidated bank, now known as First Security National Bank and Trust Company, carried on the business that had formerly been carried on by old First National and old Security. It continued to serve the customers and clients of the two old banks and in the ordinary course of business acquired many new ones, as First Security obtained its fair share of the new business which has been generated by the continued growth and industrial development of metropolitan Lexington and the surrounding area. By the end of 1963 more than 20 percent of First Security's depositors were

persons who had not been customers of either First National or old Security Trust. First Security had acquired 83 new trust accounts, with some $4 million in assets which had not been in the accounts of either of the old banks. In the ordinary course of business, many loans held by the two banks at February 28, 1961, were paid off and discharged and new loans have been made, some of which were in excess of the maximum loan which First National would have been authorized to make, or Security Trust would have made, in accordance with sound banking practices. The bank's investment portfolio underwent many changes arising from the passage of time. Some of the securities have from time to time been redeemed, converted and reinvested in new issues, and further changes have been dictated by alterations in various banking regulations and policies. For instance, the increase to 4% in the allowable interest rate paid on savings deposits of necessity required the bank—in order to meet the competition for these deposits from other banks and savings and loan associations—to pay the maximum of 4%. Obviously, this increased the bank's operating expenses and required a change in investment policy. Consequently, at the present time First Security has substantially more investments in municipal bonds of a long term maturity and in mortgage loans than the two old banks had at the time of the consolidation.

In addition, there was considerable market activity in First Security stock. By the end of 1963 there were 191 shareholders owning 24,041 shares of stock in the consolidated bank who were not shareholders in either of the pre-existing banks. At the same time an additional 11,024 shares had been acquired in the same period by 143 shareholders who owned stock in one or the other of the two old banks.

While the new bank, as is hereinafter pointed out, scrupulously observed the requirements of the order of March 6, 1961—and even went beyond it—nevertheless in the

ordinary course of conducting business as a National bank under existing laws and regulations, substantial changes have necessarily occurred in loans and deposits, investments, trusts and estates, and the ownership of capital stock.

B. *The Supreme Court's Decision*

On April 6, 1964, the Supreme Court handed down its opinion and judgment on the government's appeal from this Court's dismissal of the Complaint. While the Supreme Court held that the consolidation violated the Sherman Act, it left open the question of relief. The ordering clause of the Court's opinion stated only "Reversed," and the Court's formal judgment[2] merely reversed the prior holding of this Court and ordered:

> "that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Kentucky *for further proceedings in conformity with the opinion of this Court.*" (Emphasis added)

In the form of its Mandate, the Court followed the suggestion of the Government contained in a memorandum filed in opposition to the defendant's motion to remand for further proof, in which is stated:

> "We continue to urge that divestiture here is the only appropriate remedy and that a remand so directing is proper. *But we would not object if this Court, in order to give the district court an opportunity to consider whether some other relief would be equally effective to cure the violation, were to frame its remand in broader terms, i.e. a remand for the entry of an appropriate decree in accordance with the Court's opinion.*" (Emphasis added)

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[2] As a technical matter, the Supreme Court did not issue a "mandate." Under Rule 59(3) of that Court's rules, no mandate is issued in cases coming from Federal courts. In lieu thereof, the clerk merely sends the lower court a copy of the Court's opinion and a certified copy of the judgment.

Neither the judgment nor the opinion mentions divestiture or undertakes to discuss in any way the relief to be granted by this Court. Thus, the Supreme Court followed its usual practice in antitrust cases "to assign to the district courts the responsibility initially to fashion the remedy . . ." (Mr. Justice Brennan in the second Du Pont case, 366 U.S. 316)

It is clear that the Court's failure to direct the imposition of specific relief on the remand was not an oversight. In the case of *United States* v. *El Paso Natural Gas Company*, 84 S. Ct. 1044, a merger case arising under the Clayton Act and decided by the Supreme Court on the same day as this case (Mr. Justice Douglas writing the opinion in both cases), the Court not only reversed a lower court judgment upholding the merger but directed the District Court to order divestiture "without delay." Mr. Justice Harlan in *El Paso*, quoted the Court's language in *International Salt Co., Inc.* v. *United States*, 332 U.S. 392, 400, that " 'The framing of' appropriate relief 'should take place in the District rather than in the Appellate Courts.' "

The posture of this case following the Supreme Court's decision should be clearly distinguished from the posture of the landmark *Philadelphia Bank* case. *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963). In the *Philadelphia* case the United States brought suit to enjoin the merger prior to the time it had actually been consummated, and, as the Supreme Court noted, 374 U.S. at 334, no steps were taken during the pendency of the litigation to consummate the merger. In the *Philadelphia* case, therefore, there was never any problem about splitting apart a single corporate entity, because the merging banks had continued to do business as separate institutions.

In the instant case, of course, the consolidation was consummated and only a single business entity remained thereafter. Thus, the Supreme Court and this Court have been presented with a truly novel problem—the problem

of "unscrambling the egg," or re-creating two banks from the business of one.

C. *Actions by the Parties After the Remand*

In view of the absence of any specific instructions in the Supreme Court's judgment, it was assumed by the defendant that the "further proceedings" in this Court on the remand would be either (a) further litigation as to the nature of the relief that should be afforded the United States, or (b) a resolution of the question of relief by an agreement of the parties subject to the approval of the Court. The latter course was chosen by the parties in order not only to avoid the time and expense of continued litigation, but also to avoid insofar as possible any further public dispute that might cause injury to First Security or to any new bank or banks to be established or re-established as a result of the Supreme Court's decision.

On April 20, 1964, just two weeks after the opinion of the Supreme Court was delivered, and prior to issuance of the Mandate herein, representatives of the bank and its counsel, upon the invitation of the Honorable William H. Orrick, Assistant Attorney General of the Antitrust Division, met with representatives of the Department of Justice, including Mr. Orrick, in Washington concerning the nature and form of the relief to be proposed to this Court.

At this initial conference, the Department of Justice made it clear that it would insist upon a Decree of Divestiture as the appropriate remedy; but, at the same time, the complexities of the problems involved on such divestiture were recognized by both parties, because (1) there are no guidelines available to follow since this is the first time divestiture of a bank under similar circumstances has been attempted, (2) banking is essentially different from an ordinary commercial or industrial business where, after an invalid acquisition, assets may be split off without great harm to the corporate body, (3) a commercial bank

owes—not owns—its inventory, i.e. its deposits, and this fact creates a sensitive area which must be carefully handled as deposits may be withdrawn at the will of the customer, and (4) confidence and stability could be seriously impaired during divestiture proceedings in the absence of cooperation of all parties concerned. The Department of Justice therefore invited the defendant to review carefully all of these and other problem areas and to submit to it for consideration a plan of divestiture which the defendant believed would be workable and practicable. It was pointed out that the Bank's management had a more thorough knowledge of banking and banking practices and procedure than representatives of the Department of Justice as well as the basic statistical information not then available to the Department and that the preparation of a plan of divestiture by the defendant, if approved by the Department, would result in a great savings of time, cost and expense in the termination of the litigation.

After several further conferences between the parties and discussions with the Comptroller of the Currency, Federal Reserve Board, Federal Deposit Insurance Corporation, and the Kentucky Banking Commissioner (it being assumed that any plan for the creation or re-creation of First National and Security Trust would require the cooperation—if not the formal approval—of each of these governmental agencies), counsel for First Security informed the Department that it desired to submit to the Department a tentative Plan of Divestiture, in an effort to see if a plan could be worked out that would be acceptable to both parties in the case but without prejudice to the right of either party to contest the matter in the event that a plan acceptable to both sides could not be negotiated.

In the meantime, on July 2, 1964, the Court entered an order giving defendant until September 1, 1964, to report

to the Court the progress made in complying with the judgment.

On August 7, 1964, counsel for First Security handed a proposed Plan of Divestiture to representatives of the Department of Justice. At the conference at which the Plan was submitted to the Department, Washington counsel for First Security informed the representatives of the Department that, while necessarily sketchy, it was a Plan which the defendant was willing to have the Department consider as a basis for settlement. It was recognized at such conference that it would be necessary to consult the other governmental agencies involved to determine that they would interpose no serious objection to the basic principles of the Plan; and that the extensive detailed work, involving close analysis of commercial checking accounts, savings accounts, loans, investments and trusts, could not be feasibly performed until the parties had some assurance that the Plan would meet the approval of the various governmental banking and regulatory agencies involved.

There followed conferences between the Department of Justice, counsel for this defendant and the various federal and state banking agencies. The banking commissioner of the Commonwealth of Kentucky was consulted because the re-created Security Trust would be a state bank subject to his supervisory jurisdiction. The Federal Deposit Insurance Corporation was consulted because its approval would have to be obtained before the new Security Trust Company could obtain federal insurance of its accounts, and because the accounts of First Security, a great part of whose assets were being disbursed, were already insured. The Comptroller of the Currency had to be consulted because any Plan of Divestiture would necessarily involve a reduction in the assets of First Security, a National bank subject to the Comptroller's supervision.

On the joint motion of the parties, the Court continued the time for making a report to the Court until December 1, 1964, and again until January 11, 1965.

In the meantime, the Court entered an order on October 12, 1964, on the petition of Dages I. Boyle to intervene and to be made a party to the action directing that "the intervenor shall not be permitted to participate in any negotiations now being effected or in progress between the parties, and the parties to this action, upon reaching any agreement or agreed judgment, may present the same to the Court without consulting the intervenor or any other person." This order seemed to contemplate that the parties would continue their negotiations and would attempt to formulate an agreed judgment to be presented to the Court for consideration. This is exactly what the parties did; and such proposed judgment, formulated to carry out the Mandate of the Supreme Court, was thereafter presented to this Court.

It was not until late in December that the Department of Justice indicated that it was ready to engage in detailed discussion as to the type of divestiture that it would agree to. Many days were spent in January working out details in conferences between counsel for First Security, the Department of Justice and the Comptroller of the Currency.

On January 11, 1965, the parties jointly reported to the Court that the defendant had submitted to the plaintiff a draft plan as a basis for discussion of the settlement of the litigation; that on December 28, 1964, defendant received from plaintiff a letter dated December 24, 1964, indicating the basic principles on which it believed a Decree should be based, some of which were in accord with the draft plan and some of which were not in accord with it; and that the parties needed additional time to negotiate a settlement. On the point motion of the parties the Court continued the hearing until February 16, 1965, and indi-

eated from the bench that this was the last extension which would be granted without good cause being shown.

Shortly prior to their report to this Court on February 16, 1965, the parties had reached substantial agreement on the main steps to be followed in recreating old First National and old Security as banking institutions having the same relative positions they had prior to the consummation of the consolidation. This agreement was embodied in the proposed Interlocutory Decree that was presented to the Court on February 16, pursuant to a stipulation of the parties. That proposed Decree provided that a new bank, to be named Security Trust Company, was to be created out of the assets of First Security so as to be, as far as practicable, the competitive equivalent of old Security Trust. The stock of the new bank was to be held by a trustee during the first year of operation of the new bank and then distributed pro rata to shareholders of First Security (to be remanded "First National"). The proposed Decree provided that the new Security Trust was, insofar as practicable to have the directors, officers, personnel, offices, furniture, equipment, capital, surplus, undivided profits, loans, savings, and checking and trusts accounts as old Security had prior to the consolidation. In addition, it was to have its proportionate share of any increments and improvements since the consolidation. The Court overruled the joint motion of the parties that the Interlocutory Decree be entered, and on the same date entered the orders in obedience to which this response is submitted.

II. This Court Should Not Appoint a Master to Separate the Two Banks

In the light of the above background, defendant respectfully urges that this Court should not appoint a special master to take over the books and records of the defendant banks for the purpose of separating them.

A. *There Is No Need for the Services of a Master*

There is nothing that could be accomplished by a special master that would not be accomplished more safely and efficiently by implementation of the Interlocutory Decree proposed by the parties, or a Decree substantially similar thereto.

When the consolidation took effect, old First National and old Security disappeared as separate business enterprises. While, as we shall discuss below, the assets and liabilities of the two former banks, as they existed on March 1, 1961, may still be identified—and thus, presumably, separated—there are a great many extremely complex and sensitive problems involved in putting two banks back in business where only a single bank has operated for four years.

Even assuming that all former customers of the two banks would desire to resume business with their former bank there is a serious problem involved in the division of the new business that First Security has acquired since the consolidation. For example, savings and checking accounts might be easily allocated to one bank or the other, but if the customer did not approve he could reject the allocation by an immediate withdrawal and re-deposit. The re-deposit might even be in an entirely new bank, thus causing a net loss to First National and Security Trust. Moreover, since loans must bear a certain ratio to deposits, the shifting of deposits might require one bank to dispose of loans in excess of the resulting ratio. Similar problems would be faced with the allocation of loans.

These problems arise notwithstanding that the bank has carefully kept the records of the two banks for identification purposes as they existed prior to the consolidation as provided in the order of March 6, 1961. It is respectfully submitted that the proper parties to carry out this delicate task of divestiture are the banks themselves, in the

manner approved by the plaintiff, in cooperation with the bank regulatory agencies, both national and state.

The business of banking is by its very nature unique and fundamentally different from an ordinary commercial or industrial enterprise and public confidence and faith in a bank's operations and management are priceless ingredients. A bank's relationship with its depositors and customers is highly confidential and the maintenance of such relationship is most important in the successful operation of every bank. Notwithstanding that the Court, in appointing a master, would not intend to affect this relationship or reflect in any way upon the public image of the bank, the appointment might be misunderstood by the general public.

Accordingly, it is respectfully submitted that there is no need for the services of a master and none should be appointed.

B. *No Exceptional Condition Exists Within Rule 53(b) for the Appointment of a Special Master*

Rule 53(b), Federal Rules of Civil Procedure, provides that "A reference to a master shall be the exception and not the rule." The same Rule further states that ". . . in actions to be tried without a jury, save in matters of account, a reference shall be made only upon a showing that some exceptional condition requires it."

In *Howes Leather Co., Inc.* v. *La Buy* (CA 7th, 1955), 226 F. 2d 703, the Court of Appeals issued a writ of mandamus compelling a District Court to vacate an order of reference of a private antitrust case to a special master under Rule 53(b). On appeal, the Supreme Court affirmed this ruling in *La Buy* v. *Howes Leather Co., Inc.*, 352 U.S. 249 (1957), saying that neither the . . . "unusual complexity of issues of both fact and law," nor "the congestion of the Court's docket" was an exceptional condition contemplated by the rule that would warrant reference of

the case to a special master. The Court pointed out that "most litigation in the antitrust field is complex. It does not follow that antitrust litigants are not entitled to a trial before a court."

The Supreme Court has had occasion to consider the wisdom of appointing receivers in cases where divestiture is required, and has most emphatically rejected this because they are "apt to do grevious injury to the public" and cause "perhaps irreparable loss to many innocent people." *United States* v. *American Tobacco Co.*, 221 U.S. 106 (1911). In that case, the Supreme Court held that American Tobacco Co. was an illegal combination in plain violation of the Sherman Act. It then turned to the question of remedy. It noted it had considered allowing a permanent injunction preventing the company from "continuing to engage in interstate commerce until the illegal situation is cured." It rejected this. It then considered directing (pp. 186-187)

> ". . . the appointment of a receiver to take charge of the assets and property in this country of the combination in all its ramifications, for the purpose of preventing a continued violation of the law, and thus working out, by a sale of the property of the combination or otherwise, a condition of things which would not be repugnant to the prohibitions of the act. But, having regard to the principles which we have said must control our action, we do not think we can now direct the immediate application of either of these remedies. . . . *The extensive power which would result from at once resorting to a receivership might not only do grievous injury to the public, but also cause widespread and perhaps irreparable loss to many innocent people. . . .*" (Emphasis supplied)

The Court then decided that it would decree the combination "to be in restraint of trade" and (p. 187):

> "2d. That the court below, in order to give effective force to our decree in this regard, be directed to hear the parties, by evidence or otherwise, as it may be

> deemed proper, for the purpose of ascertaining and determining upon some plan or method of dissolving, the combination of recreating, out of the elements now composing it, a new condition which shall be honestly in harmony with and not repugnant to the law."[3]

We respectfully submit that the method of divestiture contained in the Interlocutory Decree which we have submitted to this Court is in compliance with the procedure outlined in the Supreme Couprt's opinion in the *American Tobacco* case, and that no exceptional conditions exist here which require the appointment of a master.

C. *A Special Master Could Not Separate the Business of the Two Banks and Place Them in the Same Position They Were Before the Merger Under Applicable Federal and State Laws*

The Comptroller of the Currency approved the consolidation of the two banks into First Security as a National Banking Association "effective as of the opening of business March 1961," and the consolidated bank opened for business on that day as authorized. Subsection (2) of K.R.S. 287.173 expressly provides that

> "The franchise of a state bank as a state bank shall automatically terminate when its conversion into or merger or consolidation with a national banking association under a Federal charter is consummated and the resulting national banking association shall be considered the same business and corporate entity as the state bank, although as to rights, powers and duties the resulting bank is a national banking association."

Thus, the franchise of Security Trust was terminated and it ceased to exist as a separate bank at the time of the

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[3] More than thirty years later, a district court appointed a receiver to take over the business of a defendant held to be violating the Sherman Act. On appeal, the Supreme Court expressly disapproved the receivership and ordered the receivership promptly terminated. Hartford-Empire Co. v. United States, 323 U.S. 386, 411 (1945), 65 S. Ct. 373.

consolidation on the opening of business March 1, 1961, and the First Security alone was authorized to carry on a banking business.

The Department of Justice recognizes, as shown by the proposed Interlocutory Decree, that in order to consummate a divestiture it is necessary to re-establish and re-create a new state bank to be known as "Security Trust Company" from the present assets and liabilities of First Security, which in turn will require the cooperation and approval of the various regulatory agencies. Divestitures could not be accomplished by attempting to separate the business of the two banks that no longer exist.

We submit it would be infinitely safer and in the public interest to allow the divestiture to be accomplished by the parties with the approval of the Court, without the intervention of a master.

III. This Court Has Jurisdiction to Enter the Proposed Interlocutory Decree

In open court on February 16, 1965, the Court expressed some question whether it had jurisdiction to enter a decree of the sort agreed to and proposed by the parties. Specifically, the Court seemed concerned (1) that such a Decree would be inconsistent with the Mandate of the Supreme Court in this case, and (2) that the Court had no jurisdiction to act in a supervisory capacity during the period covered by the Decree.

Defendant respectfully submits that the entry of a Decree of the type proposed would be wholly consistent with the Supreme Court's disposition of the case, and that in antitrust cases involving both litigated and consent judgments it is common practice for district courts to retain a measure of supervisory authority over future actions of the defendant.